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The American Convention on Human Rights: Toward Uniform Interpretation of Human Rights Law

Timothy M. McCann*

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Abstract

This Note explores the sources of law available to the Inter-American Commission and Court. The structure and jurisdiction of the European system for protecting human rights and their relation to the American system are examined first. This Note then reviews some case law and interpretation procedures of the European system and the International Court.

THE AMERICAN CONVENTION ON HUMAN RIGHTS: TOWARD UNIFORM INTERPRETATION OF HUMAN RIGHTS LAW

INTRODUCTION

Violations of human rights¹ abound in Latin America.² In order to address the hemispheric problem of human rights,³ the

1. A human right has been defined as "something due a person in a social context because of his membership in the class of humanity, because he is a human being." T. MACHAN, *HUMAN RIGHTS AND HUMAN LIBERTIES* 50-51 (1975). "Human rights" are linked in history to the idea of "natural rights." *Id.* at 50. A "natural right" is a right held by virtue of one's nature; because man is a "rational animal," he is entitled to those rights which are inherent in the nature of a "rational animal." *Id.* "Human rights" and "legal rights" are not one and the same; rather, legal rights ought to coincide with human rights to the greatest extent possible. *Id.* at 52. *See generally* KING'S COLLEGE, *AN INTRODUCTION TO THE STUDY OF HUMAN RIGHTS* (1970) (tracing the origins of human rights to those of man in the modern state). It is said that human rights are of supreme importance "because they are rights of every human being to the necessary conditions of human action." A. GEWIRTH, *HUMAN RIGHTS* 3 (1982).

2. Latin American countries have either deliberately or inadvertently failed to preserve human rights, to the detriment of both their own citizens and foreign visitors. *See generally* AMNESTY INT'L, *AMNESTY INTERNATIONAL REPORT* 105-89 (1981). Amnesty International is a neutral international organization which seeks "to secure throughout the world the observance of the provisions of the Universal Declaration of Human Rights." Statute of Amnesty International, *reprinted in id.* at 403 app. I. It works toward the release of persons whose rights have been violated, and it opposes the detention of political prisoners and imposition of torture and other cruelties. *Id.*

Human rights abuses in Latin America include: "imprisonment of people for the non-violent exercise of their human rights, torture, 'disappearances,' extrajudicial killings, arbitrary arrests and prolonged detention without trial." AMNESTY INT'L REPORT, *supra*, at 105. *See also* Senate For. Rel. Comm. & House Comm. on For. Affairs, *Country Reports on Human Rights Practices for 1982*, S. REP. NO. 1, 98th Cong., 1st Sess. 380-659 (1983) [hereinafter cited as *Country Reports*]. Of particular concern to the Reagan administration is the status of human rights in El Salvador, as Congress has conditioned continued military aid to the country on the Salvadoran government's ability to curtail political violence. N.Y. Times, Nov. 16, 1982, at 1, col. 2. Leverage, which is the granting or withdrawal of aid in light of a nation's record on human rights, has been the principal foreign policy instrument used by the United States regarding human rights. *Country Reports, supra*, at 5-10. Human rights violations are not confined to Central America, but also occur in South America. *See, e.g.*, Judgment of July 3, 1980, Cámara Nacional de Apelaciones en lo Federal y Contencioso-administrativo, Buenos Aires, [1980] III Jurisprudencia Argentina 471 (Timberman case), in which an Argentine Court justified the confiscation of Timerman's newspaper, *La Opinión*, stating:

Admitting the legitimacy . . . of the Military Junta . . . there can be no doubt that the confiscation of property [by the government] constitutes a political act whose review escapes, in principle, the jurisdiction of judges There is no constitu-

Organization of American States⁴ (OAS) has established the Inter-American Commission on Human Rights⁵ (Commission) and the Inter-American Court of Human Rights⁶ (Court). The American Convention on Human Rights⁷ (Convention), which became effective

tional precept opposed to a law empowering the Executive to function as an administrative judge

Id. at 471-72 (author's translation).

3. Amnesty International also cites human rights violations in the United States. AMNESTY INT'L REPORT, *supra* note 1, at 183-84.

4. The Organization of American States (OAS) is a multilateral international organization of American republics "developed to achieve an order of peace and justice, to promote [the American States'] solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence." Charter of the Organization of American States, Apr. 30, 1948, art. 1, 2 U.S.T. 2394, 2417, T.I.A.S. 2361, 119 U.N.T.S. 3, amended by Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. 6847, 721 U.N.T.S. 324. The OAS is a regional agency within the United Nations. *Id.* For a discussion of the OAS and the Inter-American system, see 1-2 F. GARCIA-AMADOR, *THE INTER-AMERICAN SYSTEM: TREATIES, CONVENTIONS, AND OTHER DOCUMENTS* (1983). See also M. BALL, *THE OAS IN TRANSITION* (1969) (discussing the history and functioning of the OAS through 1969). The current member states of the OAS are: Antigua and Bermuda, Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay and Venezuela. 2 F. GARCIA-AMADOR, *supra*, at 467.

5. The Commission was conceived during the Fifth Meeting of the Consultation of Foreign Ministers of the OAS, held in Santiago, Chile in 1959. Inter-American Commission on Human Rights, Handbook of Existing Rules Pertaining to Human Rights, O.A.S. Doc. OEA/Ser.L/V/II.23 doc. 21, at 13 (Eng. rev. ed. 1970) [hereinafter cited as Handbook of Existing Rules]. In 1960, the Council of the OAS approved the Statute of the Commission, *id.* at 30, which was amended in 1965 to broaden the powers of the Commission. *Id.* at 14. The American Convention on Human Rights reestablished the Commission and coordinated it with a new protection mechanism, the Inter-American Court of Human Rights. American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1970) [hereinafter cited as Convention]. See generally Norris, *Observation in Loco: Practice and Procedure of the Inter-American Commission on Human Rights*, 15 TEX. INT'L L.J. 46 (1981) (describing recent procedure of the Commission); Volio, *The Inter-American Commission on Human Rights*, 30 AM. U.L. REV. 65 (1980) (describing the structure of the Commission).

6. The Commission and Court constitute the dual mechanism for the protection of rights and freedoms under the American Convention. Convention, *supra* note 5, art. 33. See generally Abranches, *The Inter-American Court of Human Rights*, 30 AM. U.L. REV. 79 (1980) (describing the Court); Buergenthal, *The Inter-American Court of Human Rights*, 76 AM. J. INT'L L. 231 (1982) (describing structure and jurisdiction of the Court).

7. See *supra* note 5. Barbados, Bolivia, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, the United States, Uruguay and Venezuela have signed the Convention. 1 F. GARCIA-AMADOR, *supra* note 4, at 91. All signatory nations except Barbados, Chile, Paraguay, Uruguay and most notably, the United States, have ratified the Convention. *Id.*

tive in 1978,⁸ specifies the activities of the Commission and Court,⁹ creating a unified weapon in the struggle to preserve and promote human rights in the Americas.

Although the Commission has entertained numerous petitions alleging violations of human rights by state parties,¹⁰ the Court has rendered judgment in only three cases.¹¹ Thus, the development of substantive and procedural human rights law by the Court remains inchoate.

However, the Commission and Court do have access to a substantial body of previously created human rights law. The American Convention is modeled¹² after the European Convention

8. The Convention entered into force on July 18, 1978, on the deposit of the eleventh instrument of ratification by an OAS member nation, Grenada. Organization of American States, Annual Report of the Inter-American Court of Human Rights 1981, O.A.S. Doc. OEA/Ser.L/III.5 doc. 13, at 28 (1982) [hereinafter cited as Annual Report].

9. The Commission is an investigatory mechanism to which petitions alleging violations of the Convention are submitted. Convention, *supra* note 5, art. 41. The Commission must appear in all cases before the Court. *Id.* art. 57.

10. During 1981-82, the Inter-American Commission investigated Convention violations in Nicaragua and requested the Inter-American Court of Human Rights to render an advisory opinion. Organization of American States, Annual Report of the Inter-American Commission on Human Rights 1981-82, O.A.S. Doc. OEA/Ser.L/II.57 doc. 6, at 12-15 (Eng. rev. ed. 1982) [hereinafter cited as Inter-American Commission Report]. The issue was whether a state would be understood to be a party to the American Convention of Human Rights on ratification, accession, date of deposit of the instrument of ratification, or at the end of the time period stated in the Vienna Convention, *opened for signature* May 23, 1969, 8 I.L.M. 679, for ratification with reservations. Inter-American Commission Report, *supra*, at 15-17. In *Effect of Reservations on the Entry Into Force of the American Convention*, 22 I.L.M. 37 (1983) (Advisory Opinion of Sept. 24, 1982), the Court determined that the Convention enters into force for a state which ratifies or adheres to it with or without a reservation on the date of deposit of its instrument of ratification or adherence. *Id.* at 50. *See also* Fox, *The American Convention on Human Rights and Prospects for U.S. Ratification*, 3 HUM. RTS. 243, 275 (1973) (citing the substantial number of petitions received by the Commission in its early years).

11. The Court's first case was *In re Gallardo*, Annual Report, *supra* note 8, at 13, *reprinted in* 20 I.L.M. 1424 (1981). The issue was whether the case was admissible to the Court if the parties failed to bring proceedings before the Commission. *Id.* at 13, 20 I.L.M. at 1430. The Court ruled the case inadmissible, because the Convention requires all petitions to be filed and evaluated by the Commission. *Id.* at 14, 20 I.L.M. at 1428. *See* Convention, *supra* note 5, arts. 51, 57. In the Court's third opinion, "Other Treaties" Subject to the Consultative Jurisdiction of the Court, 22 I.L.M. 51 (1983) (Advisory Opinion of Sept. 24, 1982), the Court held that its advisory jurisdiction should be given broad interpretation. The Court's jurisdiction can be exercised with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American states. *Id.* at 65.

12. Buergenthal, *The American and European Conventions on Human Rights: Similarities and Differences*, 30 AM. U.L. REV. 155, 156 (1980). Many of the institutions for the

on Human Rights¹³ (European Convention) and its three implementing organizations: the European Commission, the European Court of Human Rights and the Committee of Ministers.¹⁴ In thirty years, the European Commission and Court have developed case law regarding human rights.¹⁵ The European law, although not strictly applicable in all Latin American cases, provides a framework for analysis of human rights issues by the Inter-American Commission and Court.¹⁶ The International Court of Justice¹⁷ (International Court) supplies further guidelines as to the sources of law¹⁸ to be used in the interpretation of international law.

This Note explores the sources of law available to the Inter-American Commission and Court. The structure and jurisdiction of the European system for protecting human rights and their relation to the American system are examined first.¹⁹ This Note then reviews

protection of human rights are the same or similar. *See infra* notes 45-64 and accompanying text. However, a number of significant differences exist. *See infra* notes 66-73.

13. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter cited as the European Convention].

14. *Id.* arts. 19, 32.

15. The European Commission and Court of Human Rights have heard cases since 1954. *See* J. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* at vii (1969). *See also* COUNCIL OF EUROPE, 1981 REPORT ON THE ACTIVITIES OF THE COUNCIL OF EUROPE 21-22 (1982) (stating the large number of petitions accepted and ruled on by the European Commission and Court) [hereinafter cited as COUNCIL OF EUROPE REPORT].

16. The International Court of Justice has utilized cases decided by the prior Permanent Court of International Justice. *See* H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 11-13 (1958). The International Court of Justice has also referred to decisions of international arbitral tribunals. *Id.* at 15. Thus, there is precedent for an international tribunal to refer to the decisions of other international tribunals. The Americas and Europe share many legal, political and cultural traditions, and until the establishment of the Inter-American system, the European system for the protection of human rights was the only regional system of its kind. Buergenthal, *supra* note 12, at 155-56.

17. The immediate forerunner of the International Court of Justice was the Permanent Court of International Justice. For a discussion of the Permanent Court of International Justice, *see* E. HAMBRO, *THE CASE LAW OF THE INTERNATIONAL COURT* (1961); S. ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 21-26 (1973); 1 J. VERZIJL, *THE JURISPRUDENCE OF THE WORLD COURT* (1965) (describing case law of the International Court of Justice). The International Court of Justice was established as the principal judicial organ of the United Nations. U.N. CHARTER, art. 92. *See generally* H. LAUTERPACHT, *supra* note 16; S. ROSENNE, *supra*; *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* (L. Gross ed. 1976).

18. "The origins from which particular positive laws derive their authority and coercive force. Such are constitutions, treaties, statutes, usages and customs . . . [T]he authoritative or reliable works, records, documents, edicts, etc., to which we are to look for an understanding of what constitutes the law." BLACK'S LAW DICTIONARY 1251 (5th ed. 1979).

19. The protection mechanism of the European Convention consists of a Commission, Court and Committee of Ministers. European Convention, *supra* note 13, arts. 19, 32. *See*

some case law and interpretation procedures of the European system and the International Court.²⁰ Increased use of the Commission and Court, building upon the sources of law available to them, would enhance their legitimacy as forums for the development of human rights law, with the object of developing uniform interpretation of human rights law.

I. MECHANISMS FOR CREATING HUMAN RIGHTS LAW

A. *The Model: Concept and Structure of the European Convention on Human Rights*

The European Convention on Human Rights²¹ was drafted²² by the Council of Europe²³ with the general purpose of establishing a regional system for the protection of human rights in Europe.²⁴ The specific human rights which the European Convention seeks to protect include: the right to life,²⁵ freedom from torture or inhu-

also *infra* notes 21-44 and accompanying text (relating structural and procedural similarities of the European and American protection mechanisms, which create a basis for European case law as a source of law).

20. The interpretation procedures of the International Court might be utilized by the Inter-American Court as a guideline in the interpretation of international law. See *infra* notes 137-46 and accompanying text.

21. See *supra* note 13.

22. COUNCIL OF EUROPE REPORT, *supra* note 15, at 9.

23. The Council of Europe is a regional organization of twenty-one European states, consisting of the following member countries: Austria, Belgium, Cyprus, Denmark, France, Federal Republic of Germany, Greece, Ireland, Iceland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom. *Id.* at 15-16. The European Convention is open to signature only to member states of the Council of Europe. H. PETZOLD, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: CASES AND MATERIALS at i (4th ed. 1981). Five Protocols have supplemented or amended the European Convention. *Id.* For a catalogue of the European Convention and subsequent Protocols, see COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS 101-36 (1979) [hereinafter cited as COLLECTED TEXTS]. Other relevant documents, including the Rules of the European Commission, Court and Committee of Ministers are contained therein. *Id.* at 201-600.

24. COUNCIL OF EUROPE REPORT, *supra* note 15, at 21-22.

25. Article 2 of the European Convention states:

1. Everyone's *right to life* shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary :

man or degrading treatment or punishment,²⁶ the right to liberty and security of person,²⁷ and other fundamental and civil rights.²⁸ These rights are enforced against state violators by means of a protection mechanism consisting of the Commission, the Court and the Committee of Ministers.²⁹

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

European Convention, *supra* note 13, art. 2 (emphasis added).

26. Article 3 states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." *Id.* art. 3.

27. Article 5 of the European Convention states:

1. Everyone has the *right to liberty and security of person*. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

Id. art. 5 (emphasis added).

28. Examples of the rights included in the European Convention include: freedom from involuntary servitude, entitlement to a fair and public hearing in a criminal trial, freedom from ex post facto laws, respect for one's private and family life, freedom of thought and expression, the right to assemble peaceably, the right to marry and freedom from discrimination. *Id.* arts. 4, 6-12, 14.

29. See *supra* note 19.

The European Commission³⁰ serves as a screening body for petitions alleging violations of the European Convention³¹ and investigates³² those matters before it with the aim of achieving friendly settlements.³³ In the event settlement is not possible, the case may be referred to the European Court³⁴ within three months after the report of the European Commission³⁵ by the European Commission or other appropriate party.³⁶ The European Court then determines whether a violation of the European Convention and its Protocols has occurred,³⁷ and issues a judgment.³⁸ If the case is not referred to the European Court, the Committee of Ministers³⁹ decides the matter and takes appropriate action.⁴⁰

Thus, the European Convention has developed a formal procedure for the preservation of enumerated rights and for the judicial development of human rights law. Although the European Conven-

30. The number of European Commission members equals the number of states parties to the European Convention. European Convention, *supra* note 13, art. 20. The members are nominated and elected by the Committee of Ministers. *Id.* art. 21, para. 1.

31. *See id.* art. 25. The European Commission rules on the admissibility of the petition to the European system, based on criteria that require a substantial statement of a violation of the European Convention. *Id.* arts. 26-27, 29.

32. The European Commission requests information from the parties on the matter before it. *Id.* art. 28, para. a.

33. *Id.* para. b.

34. The European Commission will acknowledge its failure to achieve a friendly settlement. *Id.* art. 47.

35. The European Commission drafts a report on the facts and states its opinion on whether there has been a violation of the European Convention. *Id.* art. 31.

36. The appropriate parties are: the European Commission, a contracting party whose national is alleged to be a victim, a contracting party which referred the case to the European Commission, and a contracting party against which the complaint has been lodged. *Id.* art. 48.

37. *Id.* art. 50. The decision of the European Court shall "afford just satisfaction to the injured party." *Id.*

38. *Id.* art. 51. The judgment of the European Court is transmitted to the Committee of Ministers, which supervises its execution. *Id.* art. 54.

39. The Committee of Ministers is composed of the Ministers of Foreign Affairs of the member states of the Council of Europe. COUNCIL OF EUROPE REPORT, *supra* note 15, at 13-14.

40. The Committee of Ministers must determine by a two-thirds majority vote whether there has been a violation of the European Convention. European Convention, *supra* note 13, art. 32. In an affirmative case, the Committee of Ministers prescribes a period during which a concerned state must take measures required by the Committee's decision. *Id.* If the state is delinquent in taking satisfactory measures, the Committee then decides by a two-thirds majority vote what effect should be given to the original decision and publishes the report of the European Commission. *Id.*

tion establishes no specific enforcement procedures, the contracting parties "undertake to abide by the decision"⁴¹ of the respective organizations.⁴² The protection mechanism has enjoyed substantial success⁴³ during its three decades of operation.⁴⁴

B. *The Inter-American Human Rights System*

1. Structural and Procedural Similarities Between the European and Inter-American Mechanisms

The general purpose⁴⁵ of the Inter-American Commission on Human Rights,⁴⁶ "to promote respect for and defense of human

41. *Id.* art. 53. As to decisions of the Committee of Ministers, see *id.* art. 32, para. 4.

42. See *supra* note 41.

43. COUNCIL OF EUROPE REPORT, *supra* note 15, at 21-22. See also Sherman, *Procedural Decisions of the European Court of Human Rights: A Comparative Study*, 8 BROOKLYN J. INT'L L. 309 (1982) (describing recent developments of the European Court of Human Rights). Over the past thirty years, the European Court of Human Rights has issued more than forty judgments. *Id.* at 310. For example, in the Greek Case, [1969 The Greek Case] Y. B. EUR. CONV. ON HUM. RTS. (Eur. Comm'n on Hum. Rts.), Norway, Sweden, Denmark, and the Netherlands jointly filed complaints with the European Commission against the Greek military regime, charging that the Greek government had violated its obligations under the European Convention. 1967 Y.B. EUR. CONV. ON HUM. RTS. 586 (interstate applications). Specifically, the complainants stated in new allegations that the Greek government had engaged in incidents of torture and inhuman and degrading treatment, that a particular constitutional amendment resulted in penal legislation and measures of confiscation, and that the absence of an elected legislative body prevented people from freely expressing their opinion. *Id.* After the parties failed to reach a friendly settlement, the European Commission filed its report with the Committee of Ministers. 1969 Y.B. EUR. CONV. ON HUM. RTS. 6-7. The Committee agreed with the European Commission's report and urged the Greek government to curb its abusive activities. [1969 The Greek Case] Y.B. EUR. CONV. ON HUM. RTS. 511, 513 (Eur. Comm. of Ministers). The case generated a substantial amount of pressure on the Greek government, aiding the eventual restoration of freedoms in Greece. Buergenthal, *supra* note 12, at 160-61.

44. See *supra* note 15.

45. The Inter-American Commission on Human Rights was the first mechanism established by the OAS to supervise the protection of human rights. See *supra* note 5. The Statute of the Commission made the Commission an autonomous entity of the OAS whose function was to "promote respect for human rights." Statute of the Inter-American Commission on Human Rights, in Handbook of Existing Rules, art. 1, *supra* note 5, at 30. The revised OAS Charter increased the power of the Commission. See Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 AM. J. INT'L L. 828, 833-36 (1975). The revised OAS Charter urged the construction of an Inter-American Convention to consolidate the functions of the Commission and other organs relating to human rights. *Id.* at 834.

46. Convention, *supra* note 5, art. 41(1).

rights,"⁴⁷ resembles that of the European Commission.⁴⁸ The investigative and reporting procedures of the two Commissions are also strikingly similar.⁴⁹ If the parties cannot reach a friendly settlement,⁵⁰ both Commissions may prepare reports and state their opinions on whether a violation has occurred.⁵¹ Both may then refer such cases to their respective Courts.⁵² However, alternatives to court action are available in both the American⁵³ and European systems.⁵⁴

Procedures of the Courts are set forth in the Court Rules.⁵⁵ Although there are several differences in Court procedures,⁵⁶ the

47. *Id.* Article 41(2) further states:

In the exercise of its mandate, it shall have the following functions and powers:

- a. to develop an awareness of human rights among the peoples of America;
- b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
- c. to prepare such studies or reports as it considers advisable in the performance of its duties;
- d. to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
- e. to respond, through the General Secretariat of the Organization of the American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;
- f. to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and
- g. to submit an annual report to the General Assembly of the Organization of American States.

Id. art. 41(2).

48. See European Convention, *supra* note 13, preamble & art. 19.

49. The respective Conventions require the Commissions to request information from the parties, evaluate the facts and prepare reports on their findings. See *id.* arts. 28, 31; Convention, *supra* note 5, art. 41.

50. The goal of both Commissions is to reach friendly settlements. Compare Convention, *supra* note 5, art. 48 with European Convention, *supra* note 13, art. 28.

51. See Convention, *supra* note 5, art. 50; European Convention, *supra* note 13, art. 31.

52. See Convention, *supra* note 5, art. 62, para. 3; European Convention, *supra* note 13, art. 48.

53. Under the American Convention, if a case is not settled or submitted to the Court within three months after transmittal of the Commission's report to the parties concerned, the Commission itself decides the matter by an absolute majority vote. See Convention, *supra* note 5, art. 51, para. 1.

54. See *supra* notes 39-40 and accompanying text.

55. RULES OF PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS, in Organization of American States, Annual Report of the Inter-American Court of Human Rights - 1980, O.A.S. Doc. OEA/Ser. L/V/III.3 doc. 13 corr.1, at 26 (1981); RULES OF THE EUROPEAN COURT OF HUMAN RIGHTS, in COLLECTED TEXTS, *supra* note 23, at 400-33.

56. The Commission, rather than a separate Committee of Ministers, decides a case that is not submitted to the Court under the American Convention. See *supra* notes 53-54 and

Courts function similarly. For example, both Courts have jurisdiction to render advisory and adjudicatory opinions.⁵⁷ In addition, both Courts require that the state party involved be represented on the Court.⁵⁸ As in the European Convention,⁵⁹ there are no specific Convention provisions addressing enforcement of a Court judgment. By ratifying, however, the state parties do assume the obligation to comply with an adjudicatory judgment.⁶⁰

Another procedural similarity between the European and American Conventions, the requirement that the Commission appear in all cases before the Court,⁶¹ was the subject of the Court's first case, *In re Gallardo*.⁶² In this case, the government of Costa

accompanying text. Other differences in procedure are minor. Structurally, the Courts differ in that the number of judges of the European Court equals the number of members of the Council of Europe, while the Inter-American Court consists of seven judges. *See* European Convention, *supra* note 13, art. 38; Convention, *supra* note 5, art. 52.

57. The power to give advisory opinions in the European system, however, is much narrower than in the Inter-American system. Whereas the European Court may render an advisory opinion only on legal questions concerning the interpretation of the European Convention and its Protocols, Protocol 2 to the European Convention, May 6, 1963, art. 1, Europ. T.S. No. 44, at 1, the Inter-American Court may interpret any treaty concerning protection of human rights in the American States. Convention, *supra* note 5, art. 64. Under the European Convention, only the Committee of Ministers and the Council of Europe may request an advisory opinion. Protocol 2 to the European Convention, *supra*, arts. 1-4. For a discussion of this subject, see Buergenthal, *supra* note 12, at 162-63.

Both Courts have adjudicatory jurisdiction to decide a case on its merits, render a judgment, and award compensatory damages. *See* Convention, *supra* note 5, art. 63; European Convention, *supra* note 13, art. 50. The Inter-American Court may adopt provisional measures in cases of "extreme gravity and urgency." *Id.* The European Convention does not provide for the adoption of provisional measures by the European Court, but the European Court's Rules do so provide. RULES OF THE EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 55, rule 34.

58. *See* Buergenthal, *supra* note 12, at 158-59. The composition of the Court affords representation on the European Court. *Id.* The American Convention provides for a system of ad hoc judges in this case. *Id.*

59. *See supra* notes 41-42 and accompanying text.

60. Convention, *supra* note 5, art. 68. Execution of judgments is in accordance with the domestic procedures governing the execution of judgments against the state. *Id.*

61. Convention, *supra* note 5, art. 57. The necessity of preliminary action is also recognized by the European Court. European Convention, *supra* note 13, arts. 25, 47. *See also* H. PETZOLD, *supra* note 19, at vii-viii (explaining the implementing machinery of the European Convention).

62. *See supra* note 11. The government of Costa Rica petitioned the Court to determine whether the government had violated the rights of a woman allegedly murdered by one of her guards in a Costa Rican jail. *In re Gallardo*, Annual Report, *supra* note 8, at 13, 20 I.L.M. at 1424. A private petition was *not* filed first with the Commission. *Id.*

Rica attempted "to formally waive the requirement for the prior exhaustion of all domestic legal remedies and the prior exhaustion of the procedures set forth in Articles 48 to 50 of the Convention."⁶³ The Court held that screening by the Commission is an indispensable step in the processing of petitions.⁶⁴

2. Access to the Commissions and Courts by Ratifying OAS Members

The development of human rights law by the European and American Courts is influenced necessarily by the nature of the cases before them. Provisions of the Conventions governing accessibility to the Commissions⁶⁵ determine which issues the Courts may decide. Provisions of the two Conventions differ substantially in that the Inter-American system attempts to encourage a nonpolitical approach to human rights by favoring individual complaints,⁶⁶ while the European system favors interstate complaints.⁶⁷

A state party to the American Convention automatically accepts the Commission's jurisdiction to hear individual complaints by ratifying the Convention.⁶⁸ However, the comparable jurisdiction of the European Commission must be acknowledged in a separate declaration.⁶⁹ This distinction is reversed as to interstate

63. Annual Report, *supra* note 8, at 13, 20 I.L.M. at 1425.

64. *Id.* at 8, 20 I.L.M. at 1431. The Commission's procedure for acting on a petition is described in article 48 of the Convention. Convention, *supra* note 5, art. 48. For an example of a petition, see Handbook of Existing Rules, *supra* note 5, at 48.

65. Convention, *supra* note 5, arts. 44, 45; European Convention, *supra* note 13, arts. 24, 25.

66. The Convention favors individual petitions because merely by ratifying the Convention, a nation accepts the competence of the Commission to hear such complaints. Convention, *supra* note 5, art. 44. *See also infra* note 68 and accompanying text.

67. *See generally* Buergethal, *supra* note 12, at 159-61 (discussing political ramifications of differences in jurisdiction of petitions). Only Cyprus, France, Greece, Malta, Spain and Turkey have not filed separate declarations recognizing the competence of the European Commission to receive individual petitions. H. PETZOLD, *supra* note 19, at iv.

68. Article 44 of the Convention states:

Any person or group of persons, or any nongovernmental entity legally recognized in one of [sic] more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

Convention, *supra* note 5, art. 44 (emphasis added).

69. *See* European Convention, *supra* note 13, art. 25.

complaints. A state party to the American Convention must file a separate declaration accepting the Commission's jurisdiction,⁷⁰ but European state parties need only ratify the European Convention to accept jurisdiction of the European Commission to hear interstate complaints.⁷¹ Jurisdiction of both the Inter-American and European Courts, in contrast to their Commissions,⁷² requires acceptance by declarations of the states parties; mere ratification is not sufficient.⁷³

3. Access to the Commission and Court by Nonratifying OAS Members

To the extent that nonratifying OAS member states can participate in proceedings before the Inter-American Commission and Court,⁷⁴ they may affect the development of human rights law by

70. Article 45 of the Convention provides:

1. Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.

2. Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration.

3. A declaration concerning recognition of competence may be made to be valid for an indefinite time, for a specified period, or for a specific case.

4. Declarations shall be deposited with the General Secretariat of the Organization of American States, which shall transmit copies thereof to the member states of that Organization.

Convention, *supra* note 5, art. 45. Costa Rica, Peru and Venezuela have filed this declaration. Annual Report, *supra* note 8, at 28.

71. European Convention, *supra* note 13, art. 24.

72. See *supra* notes 68-71 and accompanying text.

73. Convention, *supra* note 5, art. 62; European Convention, *supra* note 13, art. 46. Thus far, Costa Rica, Honduras, Peru and Venezuela have unconditionally recognized the jurisdiction of the Court. Status of the American Convention on Human Rights, Annual Report, *supra* note 8, at 28. By invitation of the Commissions, however, jurisdiction may be accepted by special agreement of the parties to the dispute. See Convention, *supra* note 5, art. 62, para. 3; European Convention, *supra* note 13, art. 25.

74. Nonratifying OAS members cannot participate in the protection mechanisms of the American Convention as freely as ratifying members. An OAS member state may not bring a petition before the Commission as a governmental entity, but a ratifying OAS member state, after filing a separate declaration recognizing the competence of the Commission to receive interstate complaints, may submit an interstate petition. See Convention, *supra* note 5, art.

these bodies.⁷⁵ Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the OAS,⁷⁶ may lodge a petition with the Commission.⁷⁷ The complainant need not be the alleged victim or a relative.⁷⁸ For example, an entity within the United States may lodge an individual petition with the Commission at present, despite the fact that the United States has not ratified the Convention.⁷⁹ If the complainant is a governmental entity,⁸⁰ it must not only ratify the Convention,⁸¹ but must also file a separate declaration recognizing the competence of the Commission.⁸² Thus, a governmental entity such as the United States may not file a petition with the Commission at present.

II. SOURCES OF HUMAN RIGHTS LAW AND INTERPRETATION

The Commission and Court, although relatively new organizations,⁸³ do not function in a vacuum regarding the substantive law to be applied in petitions received by the Commission and cases referred to the Court. The Convention covers a broad range of "civil and political rights."⁸⁴ Each article treats a fundamental

45. A ratifying OAS member subjects itself to the jurisdiction of the Commission to hear individual complaints. *See id.* art. 44.

75. The protection mechanisms of the European Convention, for example, have developed extensive case law by the participation of the members of the Council of Europe. *See COUNCIL OF EUROPE REPORT, supra* note 15, at 21-22.

76. Convention, *supra* note 5, art. 44.

77. An example of a legally recognized entity is the international organization Amnesty International. *See supra* note 2. The organization has utilized the jurisdiction provision of article 44 to submit petitions before the Commission. AMNESTY INT'L REPORT, *supra* note 2, at 107-08.

78. *See* Convention, *supra* note 5, art. 44.

79. The United States is an OAS member state. *See supra* note 4.

80. Convention, *supra* note 5, art. 45.

81. *Id.* para. 1.

82. *Id.* para. 2.

83. The Organization of American States established the Commission at the Fifth Meeting of Consultation of Ministers of Foreign Affairs in Santiago, Chile in 1959. *See supra* note 5. The American Convention provides for the Court of Human Rights. Convention, *supra* note 5, art. 33. *See also supra* note 8 (tracing ratification history of the Convention).

84. The civil and political rights addressed in the Convention are contained in articles 3-25. The rights include: the right to juridical personality, the right to life, the right to humane treatment, freedom from slavery, the right to personal liberty, the right to a fair trial, freedom from ex post facto laws, the right to compensation, the right to privacy, freedom of conscience and religion, freedom of thought and expression, the right of reply, the right of assembly, freedom of association, the rights of the family, the right to a name, the rights of

right in detail.⁸⁵ Article 29 of the Convention⁸⁶ provides guidelines for interpreting these articles:

No provision of this Convention shall be interpreted as:

- a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.⁸⁷

the child, the right to nationality, the right to property, freedom of movement and residence, the right to participate in government, the right to equal protection and the the right to judicial protection. Convention, *supra* note 5, arts. 3-25. For a discussion of the fundamental rights stated in the Convention, see Monroy-Cabra, *Rights and Duties Established by the American Convention on Human Rights*, 30 AM. U.L. REV. 21 (1981).

85. For example, the Convention describes the "right to life" as follows:

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be reestablished in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

Convention, *supra* note 5, art. 4.

86. *Id.* art. 29.

87. *Id.*

Article 29 permits other sources of law to be applied by the Inter-American Court because the section does not exclude rights that are not specifically named. The similarity of rights enumerated in the Convention to those enumerated in the European Convention⁸⁸ permits analogy to European Commission and Court cases.

A. Article 29(a): Law of the Convention

Article 29(a) states that no state party, group or individual may restrict the rights and freedoms protected in the Convention.⁸⁹ The Court has not yet determined the meaning of this section. However, the European Convention provides:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the [European] Convention.⁹⁰

This provision of the European Convention has been interpreted to prohibit invoking the European Convention for the purpose of destroying protected human rights.⁹¹ The European Court and European Commission have applied the same logic when the article was invoked as a "sword" and when it was used as a defense: in both situations, Convention rights are given utmost priority.

In *Federal Republic of Germany*,⁹² the German government's dissolution of the Communist Party in order to protect "Convention

88. The rights enumerated in the European Convention include: the right to life, a prohibition against cruel or inhuman treatment, a prohibition against involuntary servitude, the right to liberty of person, the right to a fair trial, freedom from ex post facto laws, the right to a family and private life, freedom of thought, conscience and religion, freedom of expression, freedom of association, the right to marry and the right to judicial remedy. European Convention, *supra* note 13, arts. 2-13. Protocols to the European Convention supplement the above rights with: the right to property, Protocol 1 to the European Convention, Dec. 13, 1957, art. 1., Europ. T.S. No. 9, at 1; the right to education, *id.* art. 2; the right to free elections, *id.* art. 3; freedom of movement, Protocol 4 to the European Convention, Sept. 16, 1963, art. 2, Europ. T.S. No. 46, at 1; and a prohibition against collective expulsion of aliens, *id.* art. 4.

89. Convention, *supra* note 5, art. 29(a).

90. European Convention, *supra* note 13, art. 17.

91. See *infra* notes 92-97 and accompanying text.

92. 1957 Y.B. EUR. CONV. ON HUM. RTS. 222-25 (Eur. Comm'n of Hum. Rts.) (decision on admissibility). West Germany dissolved and outlawed the Communist Party in August 1956. *Id.* at 222.

rights" was held not to be a violation of party members' individual rights.⁹³ In the *Lawless Case*,⁹⁴ however, the European Court dismissed the Irish government's claim that the defendant's Irish Republican Army activities could be suppressed because they were directed toward destruction of Convention rights. The Court held that the defendant's Convention rights to liberty and security of person and to a fair and public hearing were overridden by article 29(a) only if they were exercised *specifically* for the destruction of Convention rights.⁹⁵ In the *De Becker Case*,⁹⁶ the European Commission stated that "Article 17 cannot be used to deprive an individual of his rights and freedoms permanently merely because at some given moment he expressed totalitarian convictions and acted consequently."⁹⁷ Thus, the European Court and Commission were concerned lest criteria be established which would restrict individuals' rights more than was absolutely necessary to prevent those individuals from destroying Convention rights of others.

Given the rule of *Federal Republic of Germany*, a nation such as El Salvador could argue that article 29(a) of the Convention supports a policy of declaring certain political parties illegal. The *Lawless* and *De Becker* cases, however, qualify the holding of *Federal Republic of Germany* in that individual rights can only be infringed to the extent that they *specifically* undermine other Con-

93. The European Court held that:

Recourse to [Communist] dictatorship in order to install a regime is incompatible with the Convention in that it involves the destruction of a number of rights or liberties protected by the Convention.

The organization and functioning of the Party . . . constitute, in the circumstances of the case, an activity within the meaning of article 17.

Id. at 225 (author's translation).

94. 1961 Y.B. EUR. CONV. ON HUM. RTS. 430 (Eur. Ct. of Hum. Rts.) (judgment).

95. The European Court held:

Whereas in the opinion of the Court the purpose of Article 17, insofar as it refers to groups or to individuals, is to make it impossible for them to derive from the Convention a right to engage or perform any act aimed at destroying in any activity any of the rights and freedoms set forth in the Convention; whereas, therefore, no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms; whereas this provision, which is negative in scope cannot be construed *a contrario* as depriving a physical person of the fundamental individual rights guaranteed by Articles 5 and 6 of the Convention.

Id. at 452.

96. 1962 Y.B. EUR. CONV. ON HUM. RTS. 320 (Eur. Ct. of Hum. Rts.) (judgment).

97. Eur. Comm'n on Hum. Rts. Docs., Ser. B, 137, 138, *quoted in* J. FAWCETT, *supra* note 15, at 255.

vention rights. Even in *Federal Republic of Germany*, the European Commission refused to find dictatorship permissible.⁹⁸

B. Article 29(b): Domestic Law

Article 29(b) provides that the Convention shall not be used to restrict a right or freedom recognized by the domestic laws of a state party.⁹⁹ There is no directly parallel provision in the European Convention. A fair reading of this subsection, however, strongly suggests the interpretation that a state party's domestic laws may protect a broader array of freedoms than the Convention guarantees. Thus, while the Convention seeks to establish guarantees, it is not intended to be exhaustive. An interesting issue to be settled in the course of future adjudication is whether this provision prevents a state party from abrogating rights or guarantees that it previously afforded its citizens. The European court has not addressed this possibility. In certain cases, the European Convention does permit a suspension of guarantees, but only if a nation meets the heavy burden of proving a "public emergency."¹⁰⁰

C. Article 29(c): Fundamental Rights

Article 29(c), like subsections (a) and (b), permits broad interpretation of Convention rights. The guarantees "inherent in the human personality"¹⁰¹ are subject to debate, but include at least the right to life, the right to humane treatment and freedom of conscience and religion.¹⁰² Those rights "derived from representative

98. See 1957 Y.B. EUR. CONV. ON HUM. RTS. 222 (Eur. Comm'n on Hum. Rts.) (decision on admissibility). For the precise holding of the European Commission, see *supra* note 93. The Convention provides that rights may be suspended "[i]n time of war, public danger, or other emergency that threatens the independence or security of a State Party." Convention, *supra* note 5, art. 27, para. 1. Certain rights *cannot* be suspended: the right to juridical personality, the right to life, the right to humane treatment, freedom from slavery, freedom from ex post facto laws, freedom of conscience and religion, the rights of the family, the right to a name, the rights of the child, the right to nationality and the right to participate in government. *Id.* para. 2.

99. Convention, *supra* note 5, art. 29.

100. See generally J. FAWCETT, *supra* note 15, at 245-50 (discussing the heavy burden of proof required to demonstrate a "public emergency"). On the suspension of guarantees in the Convention, see Norris & Reiton, *The Suspension of Guarantees: A Comparative Analysis of the American Convention on Human Rights and the Constitutions of the State Parties*, 30 AM. U.L. REV. 189 (1981); see also *supra* note 98.

101. Convention, *supra* note 5, art. 29(c).

102. These rights include, at minimum, those which cannot be suspended at any time under the Convention. See *supra* note 98. See also *Country Reports*, *supra* note 2, at 1

democracy" include the right to a juridical personality, the right to travel freely within one's own country, and freedom from discrimination.¹⁰³

A new "right" that has been the subject of contemporary discussion is the "right to development."¹⁰⁴ This "right" is not explicitly stated in the Convention, but is set forth in human rights resolutions of the United Nations¹⁰⁵ and in the American Declaration of the Rights and Duties of Man¹⁰⁶ (Declaration). The European system has not addressed this poorly defined right. Most applications to the European Court and Commission concerned other fundamental rights, including the right to liberty and security of person¹⁰⁷ and the right to a "fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."¹⁰⁸ Efficient application of available sources of law therefore demands that the Inter-American Court postpone resolution of the "right of development" in favor of adjudicating questions previously addressed by other international tribunals.

D. Article 29(d): *The American Declaration of Rights and Duties of Man and Other International Acts of the Same Nature*

1. The American Declaration of the Rights and Duties of Man

The Declaration¹⁰⁹ has been called "the cornerstone for structuring of the Inter-American system for the protection of human

(describing fundamental rights that deal with the inviolability of the person). See generally T. MACHAN, *supra* note 1, at 16-26 (discussing the theory of modern natural rights inherent in the human personality as developed by Hobbes and Locke).

103. See *Country Reports*, *supra* note 2, at 2. These rights are derived not from the inherent nature of man, but from moral premises inherent in the democratic form of government. See *id.*

104. See *id.* at 4-5. The right to development is stated in several declarations of rights. See *infra* notes 105-06.

105. See, e.g., International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 4950, U.N. Doc. A/6316 (1966), reprinted in *Human Rights: A Compilation of International Instruments*, U.N. Doc. ST/HR/1/Rev.1, U.N. Sales No. E.78.XIV.2 (1978) [hereinafter cited as *International Covenant*].

106. American Declaration of Rights and Duties of Man, O.A.S. Res. 30, Handbook of Existing Rules, *supra* note 5, at 22, reprinted in 5 T. BUERGENTHAL & R. NORRIS, *HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM* at i (1982) [hereinafter cited as *Declaration*].

107. European Convention, *supra* note 13, art. 5. See J. FAWCETT, *supra* note 15, at 57-120.

108. European Convention, *supra* note 13, art. 6. See J. FAWCETT, *supra* note 15, at 120-77.

109. See *supra* note 106.

rights.”¹¹⁰ Because the Declaration was the source of many of the rights enumerated in the Convention,¹¹¹ the Commission and Court may be expected to rely heavily upon the Declaration in evaluating a petition.

The Declaration is divided into two chapters.¹¹² The first, entitled “Rights,” includes many of the guarantees considered “fundamental” because they emphasize individual human dignity.¹¹³ Also included in this section are certain progressive rights, such as the right to education,¹¹⁴ the right to the benefits of culture¹¹⁵ and the right to work and to receive fair remuneration.¹¹⁶ Chapter two, “Duties,” addresses the responsibilities of citizens and makes the rights of chapter one contingent on performance of these duties.¹¹⁷ This section includes: the duty to obey the law,¹¹⁸ the duty to serve the community and nation¹¹⁹ and the duty to vote.¹²⁰ However, the extensive list of duties in the Declaration is subsumed in article 32 of the Convention, suggesting that the drafters of the Convention intended to emphasize rights rather than responsibilities.¹²¹

110. 5 T. BUERGENTHAL & R. NORRIS, *supra* note 106, at i.

111. The rights contained in the Declaration include: the right to life, liberty and personal security, the right to equality before the law, the right to religious freedom and worship, the right to freedom of investigation and opinion, the right to protection of honor and family, the right to protection for mothers and children, the right to residence and movement, the right to inviolability of home and correspondence, the right to preservation of health, the right to education, the right to benefits of culture, the right to work and to fair remuneration, the right to leisure time, the right to social security, the right to recognition of juridical personality, the right to a fair trial, the right to nationality, the right to vote and participate in government, the right of assembly, the right of association, the right to property, the right of petition, the right to protection from arbitrary arrest, the right to due process of law and the right to asylum. Declaration, *supra* note 106, arts. 1-28.

112. *Id.* arts. 1-28 (ch. 1), arts. 29-38 (ch. 2).

113. Such rights include the right to life and security of person, the right to religious freedom and freedom of expression. *Id.* arts. 1, 3, 4.

114. *Id.* art. 12.

115. *Id.* art. 13.

116. *Id.* art. 14.

117. *Id.* arts. 29-38.

118. *Id.* art. 33.

119. *Id.* art. 34.

120. *Id.* art. 32. The duties listed in the Declaration also include: the duty to others, the duty toward children and parents, the duty to receive an elementary education, the duty to cooperate regarding social security, the duty to pay taxes, the duty to work and the duty as an alien to refrain from political activities in a foreign country. *Id.* arts. 29-31, 35-38.

121. Article 32 of the Convention states:

Relationship between Duties and Rights

1. Every person has responsibilities to his family, his community, and mankind.

Article 62 of the European Convention, which precludes parties from resorting to treaties, conventions, and declarations other than the European Convention and Protocols,¹²² runs counter to article 29(d) of the American Convention. This provision of the European Convention states that parties may not object to the European Commission's jurisdiction on the ground that conflicting treaty obligations require them to submit the case to another body.¹²³ Because there is no similar provision in the American Convention, the Court itself must ensure that its interpretation of article 29(d) does not permit states to invoke other human rights agreements to avoid the jurisdiction of the Commission and Court.

2. Other International Human Rights Acts

The broad language of article 29(d) permits the incorporation of other international declarations of rights,¹²⁴ such as the Universal Declaration of Human Rights,¹²⁵ (Universal Declaration) and the International Covenant on Economic, Social and Cultural Rights¹²⁶ (International Covenant). These international declarations¹²⁷ pro-

2. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.
Convention, *supra* note 5, art. 32.

122. European Convention, *supra* note 13, art. 62.

123. See J. FAWCETT, *supra* note 15, at 340-41.

124. Convention, *supra* note 5, art. 29(d).

125. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 72 (1948), reprinted in Human Rights: A Compilation of International Instruments, *supra* note 105, at 1 [hereinafter cited as Universal Declaration].

126. See *supra* note 105.

127. Article 29 of the Convention permits the incorporation of "international acts of the same nature." Convention, *supra* note 5, art. 29(d). The declarations are United Nations resolutions. See *supra* notes 105, 125. Thus, they are international documents and also fulfill the "same nature" requirement in that they were specifically drafted to address the human rights problem. See Universal Declaration, *supra* note 125, preamble; International Covenant, *supra* note 105, preamble.

Concern for human rights arose from atrocities committed during World War II. "The catalyst to which we owe the Universal Declaration of Human Rights . . . was the gross violations of human rights that were committed in and by certain countries during and immediately before the Second World War." Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21 (B. Ramcharan ed. 1979). The focus of human rights has changed. The International Covenant, a more recent document, requires international assistance and cooperation, especially economic and technical, to realize fully all enumerated rights rather than concentrating on natural rights. International Covenant, *supra* note 105, art. 1, para. 1.

test many of the same rights.¹²⁸ All emphasize the right to life,¹²⁹ the right to be free from torture and cruel punishment¹³⁰ and the right of security of the person.¹³¹ The Court may draw on rights protected by the declarations even though they are not included in the Convention. For example, the International Covenant addresses several economic and cultural rights not described in the Convention.¹³² Although the broad language of article 29(d)¹³³ permits the Court to draw on these rights, state parties might resist complying with a decision based on non-Convention rights,¹³⁴ especially during the Court's formative years.¹³⁵ At this time, therefore, the Court will utilize other international acts most effectively as legal support for decisions based fundamentally on rights already addressed in the Convention.¹³⁶

128. See Universal Declaration, *supra* note 125, arts. 1-30; International Covenant, *supra* note 105, arts. 1-25.

129. See Universal Declaration, *supra* note 125, art. 3; Convention, *supra* note 5, art. 4.

130. See Universal Declaration, *supra* note 125, art. 5; Convention, *supra* note 5, art. 5.

131. See Universal Declaration, *supra* note 125, art. 12; Convention, *supra* note 5, art. 7.

132. The International Covenant addresses the right of self-determination, the right to a fair standard of living, the right to education, and the right to culture. See International Covenant, *supra* note 105, arts. 1, 11, 13, 15.

133. See *supra* note 127 (discussing the declarations' fulfillment of the requirements of article 29).

134. Compliance with an adjudicatory judgment is not mandatory under the Convention. See *supra* note 60. The protection mechanism of the Convention is designed to address "commitments made by the States Parties to this Convention." Convention, *supra* note 5, art. 33. Thus, a Court decision based on rights not explicitly stated in the Convention may create reluctance to comply with the decision, because a commitment to rights outside the Convention by ratification is more recondite than to those explicitly addressed.

135. The Court was only recently established upon entry into force of the Convention in 1978. See *supra* note 8.

136. Decisions based on the fundamental rights which *are* addressed in the Convention may achieve greater consensus, and therefore greater possibility of success.

Although many of the rights are comparable, the similarities among declarations may be obscured by differences in drafting. For example, compare the respective provisions governing freedom of movement and the right of asylum in the Convention and in the Universal Declaration of Human Rights. Article 22 of the Convention provides that:

1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.

2. Every person has the right to leave any country freely, including his own.

....

7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.

Convention, *supra* note 5, art. 22 (emphasis added).

On the other hand, articles 13 and 14 of the Universal Declaration of Human Rights provide:

Article 13

1. *Everyone has the right to freedom of movement and residence within the borders of each State.*
2. *Everyone has the right to leave any country, including his own, and to return to his country.*

Article 14

1. *Everyone has the right to seek and to enjoy in other countries asylum from persecution.*
2. *This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.*

Universal Declaration of Human Rights, *supra* note 125, arts. 13-14 (emphasis added).

The rights of movement in the Convention and Universal Declaration are similar, but the right of asylum is treated differently. The Convention provision places the burden of proving political motivation of the persecution on the individual being persecuted. Convention, *supra* note 5, art. 22. The language "related common crimes" also may permit a broad interpretation. *Id.* In the Universal Declaration provision, the nonpolitical nature of the crime must be established. Universal Declaration, *supra* note 125, art. 14. Acts "contrary to the purposes and principles of the United Nations" may be interpreted to include a broad range of offenses. *Id.*

The International Covenant on Economic, Social and Cultural Rights, *supra* note 105, includes a number of political rights which are not addressed in the Convention. Whether the civil and political rights will become subjects of Court adjudication is open to speculation.

137. The primary function of the International Court has been the arbitration of disputes arising from conflicting interpretations of treaties. H. LAUTERPACHT, *supra* note 16, at 395. Thus, the main goal of the International Court is to determine the intentions of the parties on entering into the treaties. *Id.* When these intentions are not clear, the International Court can only ascertain them against the background of customary international law. *Id.* For example, in *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266 (Judgment of Nov. 20), the International Court was requested to determine the meaning of the term "urgent cases" in the Havana Convention of 1928, 46 Stat. 2753, T.S. No. 815, 132 L.N.T.S. 323. The Havana Convention states that "[a]sylum may not be granted except in *urgent cases* and for a period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety." *Id.* art. 2, para. 1 (emphasis added). At the time, the term "urgent cases" was not a general principle of law. The International Court, relying on article 38 of the Statute, reached out to broad principles and customs of international law to bolster its determination that "urgent cases" did not include "the danger of regular prosecution to which the citizens of any country lay themselves open by attacking the institutions of that country." 1950 I.C.J. at 284. The International Court looked beyond the terms of the Havana Convention to Latin American custom. *See id.* at 285.

Article 38 of the Statute of the International Court of Justice states the sources of law of the International Court:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;

*E. The International Court of Justice and the Value of
Uniformity in International Law*

The International Court of Justice¹³⁷ has tended to defer to its prior decisions, thus establishing a substantial body of precedent for future decisions.¹³⁸ The case law of the International Court reflects several consistent patterns. For example, the International Court has restricted its decisions to the specific matters in dispute.¹³⁹

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

I.C.J. STAT. art. 38.

An issue that arises regarding the sources of law provision is whether it establishes a priority of sources or is merely a broad description of the sources of law available to the International Court. Although the issue has not been addressed directly in a case before the International Court, the tendency of the International Court has been not to regard the provision as an ordered list of priorities. In *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J., ser. A, No. 2, at 10 (Judgment of Aug. 30), the International Court had to determine whether it had jurisdiction in the dispute. The International Court stated: "The Court . . . is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with principles of international law." *Id.* at 16.

In *Barcelona Traction* (Belg. v. Spain), 1970 I.C.J. 1 (Judgment of Feb. 5), the International Court determined that it was proper to lift "the corporate veil" in an international shareholders' dispute in special circumstances. "If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties . . . [T]he Court has . . . not only to take cognizance of municipal law but also to refer to it." *Id.* at 37. Article 38 of the Statute has afforded the International Court great flexibility in its interpretations. Kearney, *Sources of Law and the International Court of Justice*, in 2 *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE*, *supra* note 17, at 610, 707.

138. "[T]he practice of referring to its previous decisions has become one of the most conspicuous features of the Judgments and Opinions of the Court." H. LAUTERPACHT, *supra* note 15, at 9. For example, in *Conditions for Admission of a State to Membership in the United Nations*, 1948 I.C.J. 56 (Advisory Opinion of May 28), the Court rendered an advisory opinion stating: "[The International Court] does not feel it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of the convention is sufficiently clear in itself." *Id.* at 63. See also H. LAUTERPACHT, *supra* note 15, at 13-15 (emphasizing the significance of international judicial precedent).

139. The International Court has refused to address issues that are not relevant to the principal issue in dispute. For example, in *Fisheries Jurisdiction* (U.K. v. Nor.), 1951 I.C.J. 116 (Judgment of Dec. 18), the United Kingdom made claims against Norway in the form of definitions which in the opinion of the International Court did not "constitute a precise and direct statement of a claim." *Id.* at 126. The International Court continued, "[t]hese elements may be taken into account only in so far as they would appear to be relevant for deciding the sole question in dispute" *Id.*

Furthermore, the International Court recognizes that convention and customary norm are primary bases for international legal interpretation.¹⁴⁰

The broad language of article 29 permits the Inter-American Court to establish its own body of precedent, following the model of the International Court.¹⁴¹ The proper development of precedent in international human rights law requires judges to exercise creativity, open-mindedness and innovativeness. However, judges of the Court may face opposition from state parties, stemming from the traditional international doctrine of state sovereignty.¹⁴² To overcome such biases, the Court must utilize the substantial contributions to human rights law of the European Commission and Court and the law and interpretation procedures of the International Court of Justice.

The advantages of such an approach in human rights law are manifold. First, uniformity would help to enforce in a practical sense the moral premises of human rights that have been delineated by philosophers.¹⁴³ Second, through judicial development, governments would become more cognizant of permissible action.¹⁴⁴ The strength of the Commission and Court lies in their predictability,¹⁴⁵ which may create consequently greater international pressure on governments to conform to the standards established by the organizations.¹⁴⁶

140. See *Asylum (Colom. v. Peru)*, 1950 I.C.J. 266 (Judgment of Nov. 20); *supra* note 137. See also Kearney, *supra* note 137, at 696-708 (discussing sources of law and interpretation procedures of the International Court).

141. Convention, *supra* note 5, art. 29.

142. The International Court has both recognized and placed restraints on state sovereignty. Thus, jurisprudential innovation by the International Court has been hindered. See H. LAUTERPACHT, *supra* note 16, at 297-400.

143. On the development of the historical foundation of human rights law, see T. MACHAN, *supra* note 1, at 3-46. Although many declarations of human rights exist, few have been enforced.

144. The existence of different moral philosophies presents a problem of reconciling them. See A. GEWIRTH, *supra* note 1, at 42-43. However, a certain "core meaning" can be elicited from them, in that all divergent moralities establish criteria for action. *Id.* at 45. Significantly, the state parties to the Convention at least agree theoretically on fundamental rights by signing and ratifying the Convention.

145. Predictability would strengthen the action of the organizations similar to the manner in which common law courts lend themselves strength by their predictability. See generally Pound, *What Is the Common Law?*, in *THE FUTURE OF COMMON LAW* 3 (1937) (describing the innate strength of the common law concept, which is based on predictability).

146. The broad support of the Council of Europe for the actions of the European Commission in the Greek Case, [1969 The Greek Case] Y.B. EUR. CONV. ON HUM. RTS. (Eur.

CONCLUSION

The existence of two regional systems for the protection of human rights and of numerous declarations of human rights at least indicates consensus on what the fundamental human rights and freedoms are. Structural and procedural similarities between the two systems also suggest agreement on the proper mechanisms for protecting these rights. Therefore, the basis for uniform interpretation of human rights law is already in place, awaiting judicial development. Notwithstanding the existence of legal systems for enforcing human rights, nations have responded to the human rights problem primarily by unilateral foreign policy action rather than by submitting human rights petitions to the Inter-American Commission and Court of Human Rights. This choice has retarded the development of human rights law.

To date, the United States has not ratified the Convention.¹⁴⁷ Bringing United States claims of human rights violations in Latin America before an international legal tribunal would enhance the legitimacy of such claims by removing them from the arena of arbitrary political maneuvering. Furthermore, the United States' utilization and eventual ratification of the Convention would contribute to the growing body of human rights law. By its participation in the Inter-American Human Rights system, the United States

Comm'n on Hum. Rts.), aided the eventual restoration of freedoms in Greece. *See supra* note 43.

147. The United States was not one of the original signatory nations to the Convention. *See* 1 F. GARCIA-AMADOR, *supra* note 4, at 91. The Convention was signed by the United States on June 1, 1977 and was submitted to the Senate for advice and consent on Feb. 23, 1978 by the Carter administration. *See* S. EXEC. DOC. NOS. C-F, 95th Cong., 2d Sess. at iii-iv (1978); Letter of Transmittal, 14 WEEKLY COMP. PRES. DOC. 395 (Feb. 27, 1978). However, the Convention was submitted to the Senate containing numerous reservations. For example, article 4, "right to life," raises constitutional issues regarding abortion. *See generally* Note, *The American Convention on Human Rights: The Propriety and Implications of United States Ratification*, 10 RUT.-CAM. L.J. 359 (1979) (discussing reservations to the Convention appended by the Department of State and the correctness of the reservations). The Convention was one of four international human rights agreements before the Senate. *International Human Rights Treaties, 1979: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. 1 (1979). At least one commentator believes the Convention to be a regressive treaty. *See* Camargo, *La Convención Americana Sobre Derechos Humanos*, 3 BOLETÍN MEX. DE DERECHO COMPARADO 272, 273-74, 277-78, 282 (1970) (arguing that by not including economic, social and cultural rights, the American Convention constitutes a regression in the field of human rights).

would thus help to create a uniform human rights law rather than merely continue to impose its foreign policy values on reluctant nations by unilateral action.

Timothy M. McCann